

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

Access Charge Reform

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CC Docket No. 96-262

PETITION FOR STAY PENDING JUDICIAL REVIEW

The NYNEX Telephone Companies

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Dated: July 23, 1997

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SUMMARY

NYNEX seeks a stay of the Commission's decision in the *Access Charge Reform Order*, as codified in 47 C.F.R. Section 69.155(c), that prohibits the local exchange carriers ("LECs") from assessing the per-minute residual transport interconnection charge ("per-minute residual TIC") on traffic that uses a LEC's Local Switching services, but that does not use the LEC's Local Transport services. If the Commission decides not to stay the rule in its entirety, the Commission should grant a partial stay that would allow NYNEX to apply the per-minute residual TIC, minus the remaining service-related costs, to that traffic. Because the Commission's rule will cause NYNEX's customers to begin shifting their traffic to competing services long before the per-minute residual TIC is established, NYNEX requests action on this petition by August 29, 1997.

The Commission's decision is inconsistent with its own findings concerning the nature of the costs that will be recovered through the remaining TIC rates. The Commission adopted this rule because it found that it would not be consistent with the procompetitive goals of the Telecommunications Act of 1996 to allow the LECs to recover their transport costs through the per-minute residual TIC with regard to traffic that is carried on the transport facilities of competitive access providers ("CAPs"). However, the Commission admitted that the nature of the costs that are recovered through the per-minute residual TIC is "unknown," and that the per-minute residual TIC may recover costs that

are not related to the LECs' transport services. The only part of the per-minute residual TIC that is clearly related to LEC transport costs after July 1, 1998 is the portion that recovers tandem switch service-related costs. Therefore, there is an inadequate basis in the record to justify a total exemption from the per-minute residual TIC for traffic that is carried on CAP transport. At the very least, the Commission should stay the portion of its rule that prohibits the LECs from recovering the non-service-related portion of the per-minute residual TIC from traffic that is routed to CAP transport.

The Commission adopted the per-minute residual TIC rule without adequate notice or opportunity for comment. The rule was not described in the *Access Charge Reform Notice of Proposed Rulemaking*, and the issue was first raised in an *ex parte* filing that was made after the close of formal comments, and just three weeks before the Commission adopted its order. Because of this inadequate notice, the record is inadequate concerning the impact of this rule on the LECs. The Commission should stay the rule pending further opportunity for comment by the industry.

A stay is necessary to avoid irreparable harm to NYNEX. NYNEX's per-minute residual TIC will be several times larger than the effective rate per-minute for NYNEX's transport services. This will cause customers to shift their transport traffic from NYNEX to the CAPs even where NYNEX's transport services are more efficient. NYNEX's loss of per-minute residual TIC revenues

and Local Transport revenues will be substantial. Even if the Commission later reversed its position and allowed NYNEX to apply retroactive rate increases, it could not order the interexchange carriers to shift their transport business back to NYNEX.

A stay would not harm others, or the public interest. It would simply maintain the status quo, under which the CAPs have been able to gain significant shares of the High Capacity market in the NYNEX region. In addition, it would promote competition by not sending incorrect pricing signals to purchasers of local transport services.

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PETITION FOR STAY PENDING JUDICIAL REVIEW

The NYNEX Telephone Companies¹ ("NYNEX") hereby request that the Commission stay its decision in the *Access Charge Reform Order*² insofar as it adopts a rule, codified in 47 C.F.R. Section 69.155(c), that prohibits the local exchange carriers ("LECs") from assessing the per-minute residual transport interconnection charge ("per-minute residual TIC") on minutes of use that use a LEC's Local Switching services, but that do not use the LEC's Local Transport services. In the event the Commission decides not to stay this rule in its entirety, the Commission should grant a partial stay that would allow NYNEX to apply the non-service related portion of the per-minute residual TIC to those minutes of use.

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

² In the Matter of Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158, released May 16, 1997 ("*Access Charge Reform Order*"); *errata* released June 4, 1997.

The Commission should grant a stay pending an appeal that NYNEX intends to file with the 8th Circuit Court of Appeals, which has been selected to hear consolidated appeals of the *Access Charge Reform Order*. Because the Commission's rule will cause NYNEX's customers to begin shifting their traffic to competing services long before the per-minute residual TIC is established, NYNEX requests action on this petition by August 29, 1997.

I. Introduction and Background.

In the *Access Charge Reform Order*, the Commission found that its access charge rules created implicit subsidies by, *inter alia*, requiring the LECs to recover local loop and other non-traffic sensitive ("NTS") costs through usage-based access charges.³ It decided to reduce these implicit subsidies by directing the LECs to recover NTS costs through more economically efficient, flat-rated charges.⁴

One of the largest usage-based access charges is the Local Transport Interconnection Charge ("TIC"). The TIC was created as part of the 1992 restructure of the usage-based Local Transport rates into both usage-based charges (Tandem Switched Transport) and flat-rated charges (entrance facility and Direct Trunked Transport) that were based largely on the LECs' existing

³ See *Access Charge Reform Order* at para. 28.

⁴ See *id.* at para. 6.

Special Access rates.⁵ The new Local Transport charges were initially set at levels that would not produce revenues equal to the revenues from the previous Local Transport rates. The TIC was created to recover the difference so that the LECs could continue to recover the costs that had been assigned to the Local Transport category.

In the *Access Charge Reform Order*, the Commission found that some of the TIC recovers costs that should be recovered through other Local Transport rates, such as the costs of SS7 signaling, tandem switching costs, DS1/voice grade multiplexer costs, host/remote trunking costs, etc. (the “service-related costs”).⁶ In the *Access Charge Reform Order*, the Commission required the LECs to identify these service-related portions of the TIC, and to shift that portion of TIC revenues, except for two thirds of the tandem switching costs, to specific Local Transport rate elements as of January 1, 1998. The remaining TIC costs will be recovered through new rate elements, the per-minute residual TIC and the new presubscribed interexchange carrier charge (“PICC”).⁷ The Commission decided that the remaining tandem switching costs in the per-minute residual TIC and

⁵ See *Transport Rate Structure and Pricing*, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (“*Local Transport Order*”); *recon.* 8 FCC Rcd 5370 (1993); *further recon.* 8 FCC Rcd 6233 (1993); *further recon.* 10 FCC Rcd 3030 (1994); *further recon.* 10 FCC Rcd 12979 (1995).

⁶ See *Access Charge Reform Order* at paras. 217-223. In the case of NYNEX, the service-related portion of the TIC was estimated to be about 22 percent, using data underlying the 1996 Annual Access Tariff Filing, which was based on 1995 demand and separations data. See *id.* at n.297.

⁷ See 47 C.F.R. Section 69.155.

PICCs as of January 1, 1998 should be shifted to the tandem switching rate element in two equal installments on January 1, 1999 and January 1, 2000.⁸ The Commission also decided that the LECs should eliminate the “unitary” rate structure option for Tandem Switched Transport on July 1, 1998 and replace it with a three-part rate structure consisting of a per-minute common transport charge, a per-minute tandem switching charge, and a flat-rated dedicated transport charge.⁹ Thus, after July 1, 1998, the only service-related costs that will remain in the residual TIC will be two-thirds of the tandem switching costs.

The Commission did not make definitive findings about the nature of the costs that are recovered through the non-service related portion of the TIC. It found that some of these costs may be related to transport services, and that some of these costs may belong in the state jurisdiction.¹⁰ In the end, the Commission admitted that the nature of the costs in the TIC is “unknown.”¹¹ The Commission found that “[t]here is conflicting evidence in the record concerning the nature of the costs contained within the residual TIC; these costs may be traffic sensitive or NTS and may be associated with common line, transport or

⁸ See *Access Charge Reform Order* at para. 218.

⁹ See *id.* at paras. 168, 175-193.

¹⁰ See *id.* at para. 225. The Commission indicated that it would consider whether some costs should be reallocated to the state jurisdiction in an upcoming Joint Board Proceeding. See *id.*

¹¹ See *id.* at para. 231.

switching services.”¹² Thus, there was insufficient evidence in the record to assign these costs to another service or jurisdiction, or to disallow them.

Since the Court in the *CompTel*¹³ case had instructed the Commission to revise its transport rate structure rules to be more consistent with cost-causation principles, the Commission established a transitional plan for phasing out the per-minute residual TIC.¹⁴ As noted, the service-related portion of the TIC will be eliminated by the year 2000 as the remaining tandem switching costs are shifted to the Tandem Switching rate element. In addition, the Commission required the LECs to target the price cap productivity (X-factor) adjustment in each annual access tariff filing, starting on July 1, 1997, to reduce the per-minute residual TIC, and to recover the remaining TIC revenues through new, non-usage sensitive PICC charges each year, subject to the PICC cap.¹⁵ The Commission allowed recovery of these residual TIC costs through PICCs because it found that some of these costs are likely to be non-traffic sensitive.¹⁶ Therefore, it found that the public interest would be served by allowing the LECs to recover these costs through flat-rated PICCs on the IXC. However, due to the caps on PICCs, there are TIC costs for some LECs that cannot be recovered through these charges.

¹² *Id.* at para. 232. See also *id.* at para. 242.

¹³ *Competitive Telecommunications Ass’n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) (“*CompTel*”)

¹⁴ See *Access Charge Reform Order* at paras. 229-240.

¹⁵ See *id.* at para. 234.

¹⁶ See *id.* at para. 233.

The Commission decided that any residual TIC revenues not recovered by the PICCs would be recovered through the per-minute residual TIC rate element.¹⁷

Thus, the Commission did not disallow any remaining TIC costs. It found that these costs should be recovered on a flat-rated basis from the IXC to whom the LEC customers are presubscribed and, if necessary, through the usage-based rates, to the extent that the costs are not reduced through the X-factor. Only the service-related portion of the residual TIC, consisting of two thirds of the tandem switching costs that are currently in the TIC and any effects of the unitary rate structure, represents LEC transport costs remaining in the TIC as of January 1, 1998. Yet, despite the clearly unquantifiable nature of residual TIC costs, the Commission decided that the LECs should not apply any portion of the per-minute residual TIC rate to minutes of use that traverse the LEC switch, but that are carried on competitive access provider's ("CAP's") transport services.¹⁸

Relying on an *ex parte* filing by Teleport and CompTel that was made after the comment period had closed, and just three weeks before the *Access Charge Reform Order* was adopted,¹⁹ the Commission found that the CAPs would pay some of the LECs' transport costs if the LECs applied the per-minute residual TIC to traffic that is carried by the CAPs.²⁰ The Commission found that

¹⁷ See *id.* at para. 239.

¹⁸ See *id.* at para. 240.

¹⁹ See *id.* at n.242.

²⁰ See *id.* at para. 240. In actuality, the CAPs do not pay the per-minute residual TIC. That rate is paid by the IXC that is the customer of record for the LEC's Switched Access service.

this would be contrary to the procompetitive goals of the Telecommunications Act of 1996. However, in the preceding section of the order, the Commission found that only the service-related portion of the remaining TIC belongs in the LECs' transport rates. While these costs will eventually be recovered through the LECs' Tandem Switching rates, the rest of the remaining TIC is intended to be recovered ultimately through PICCs regardless of which carrier, the LEC or the CAP, provides Local Transport services. In addition, since the LECs cannot recover the service-related portion of the remaining TIC through their tandem switching rates until the year 2000, any non-recovery of remaining TIC revenues from CAP transport customers will require the LECs to provide their own tandem-switched services at a loss insofar as the CAPs divert traffic from the LECs' dedicated transport services.

A price-out of the Commission's rule shows that it will have unreasonable and arbitrary effects. For example, the estimated per-minute residual TIC in the NYNEX region will vary, by zone, from 0.2 to 0.7 cents per minute.²¹ For a NYNEX DS3 dedicated Local Transport facility, the effective rate per minute of

²¹ See attached Affidavit of James Kane. In the *USPP Waiver Order*, the Commission allowed NYNEX to deaverage the TIC by zone in LATA 132, and to target rate reductions to the TIC by zone, provided that the lowest rate was not lower than the tandem switching costs recovered in the TIC. See NYNEX Telephone Companies Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment, 10 FCC Rcd 7445 (1995) ("*USPP Waiver Order*") at para. 55.

use is about 0.06 cents.²² Thus, any purchaser of Local Transport services would save far more by purchasing CAP transport and by taking advantage of the exemption from the per-minute residual TIC rate than it would pay to either the CAP or NYNEX for the transport services alone. This makes it impossible for NYNEX to compete on an equitable basis in the Local Transport market. Rather, it guarantees that NYNEX will not be able to recover the revenues that are assigned to the per-minute residual TIC rate element.

None of these issues was explored, because the Commission never put the Teleport/CompTel proposal out for comment, and the notice of proposed rulemaking in this proceeding never mentioned such a proposal. The *Access Charge Reform Order* does not provide any indication that the Commission evaluated, or even considered, the impact of this decision on the LECs.

II. Standard for Granting a Stay.

In determining whether to grant a stay, the Commission follows the four-part test established in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).²³ Under that test, a petitioner must demonstrate that; (1) it is likely to prevail on the merits on

²² See attached Affidavit of James Kane. A NYNEX DS3 service at \$44,000 per year, divided by 12 months, divided by 672 trunks, divided by 9,000 MOU per trunk = 0.06 cents per minute.

²³ See In the Matter of Access Charge Reform, CC Docket No. 96-262, Order, FCC 97-216, released June 18, 1997.

review of the Commission's decision; (2) it will be irreparably harmed absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. A petitioner need not make an equally strong showing on each element. For instance, if a petitioner makes a particularly strong showing that it is likely to succeed on the merits, it need not make as great a showing on the degree of harm as it would otherwise.²⁴

In this case, NYNEX will show that the Commission's decision to prohibit the LECs from applying the per-minute residual TIC on traffic that does not use their Local Transport services is inconsistent with the Commission's own findings concerning the costs that are recovered through the TIC. For LECs such as NYNEX, which will have a relatively large per-minute residual TIC rate for the next few years, the Commission's rule will cause a drastic reduction in revenues and a rapid loss of customers for their Local Transport services. Maintenance of the status quo would not harm NYNEX's competitors in the Local Transport market, who have been gaining increasing shares of the Local Transport market in the NYNEX region under current TIC rates that are higher than the per-minute residual TIC. In addition, a stay would benefit the public interest by allowing fair and vigorous competition in the Local Transport market based on economic efficiency, not regulatory handicaps.

²⁴ See CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995); Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Milk Industry Foundation v. Glickman, 949 F. Supp. 882, 888 (D.D.C. 1996).

III. The Commission's Rule Is Substantively And Procedurally Deficient.

A. The Per-Minute Residual TIC Rule Is Arbitrary and Capricious.

1. The Per-Minute Residual TIC Rule Is Inconsistent With The Commission's Own Findings About The LECs' Right To Recover Residual TIC Costs.

The Commission's decision to prohibit the LECs from recovering the per-minute residual TIC on CAP transport minutes is contradicted by its own findings in the *Access Charge Reform Order*. In the *Access Charge Reform NPRM*, the Commission stated that the TIC provides the incumbent LEC with a competitive advantage "to the extent that any portion of the TIC should properly be included in LEC transport."²⁵ In the *Access Charge Reform Order*, the Commission decided that the only portion of the TIC that belonged in the LECs' transport rates was the part that recovered "service-related" costs.²⁶ As of July 1, 1998, all LEC transport service-related costs will be shifted to LEC transport rates except for two thirds of the LECs' tandem switching costs, which will be transitioned to LEC transport rates over the following year and a half. Yet, the Commission decided that a LEC should recover none of the per-minute residual

²⁵ In the Matter of Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, FCC 96-488, released December 24, 1997, para. 97 ("*NPRM*").

²⁶ NYNEX estimates that its January 1, 1998 per-minute residual TIC will recover \$370 million in revenues, of which approximately 11 percent (\$41 million) will be service-related. See attached Affidavit of Frank J. Gumper. For the industry, NYNEX estimates that total per-minute residual TIC revenues will be \$775 million, of which 33 percent (\$255 million) will be service-related.

TIC on minutes of use that the LEC provides over its own switch, but that are carried on another carrier's transport services.

The Commission stated that "if the incumbent LEC's transport rates are kept artificially low and the difference is recovered through the TIC, competitors of the incumbent LEC pay some of the LEC's transport costs."²⁷ However, LEC transport rates are "artificially low" only to the extent that transport service-related costs are recovered through the remaining TIC. Under the Commission's reasoning, recovery of the non-service related portion of the remaining TIC from all LEC access customers -- even those that do not use LEC transport -- cannot harm competition in the transport market. Therefore, it is inconsistent with the Commission's own findings to prohibit the LECs from recovering the non-service related portion of the per-minute residual TIC from access customers that use another carrier's transport services.

In addition, the Commission does not explain why it is reasonable for the LECs to recover both service related and non-service related costs in PICCs, but not in the per-minute residual TIC. Some of the LECs will recover all of their remaining TIC revenues through PICCs as of January 1, 1998, and by the year 2000 all non-service related costs will be recovered through PICCs.²⁸ If the LECs are entitled to recover these amounts through PICCs regardless of which carrier

²⁷ See *Access Charge Reform Order* at para. 240.

²⁸ At that point, we estimate that only NYNEX will continue to have residual TIC costs in PICCs.

provides transport services, it is inappropriate for the Commission to prohibit the LECs from recovering these amounts through the per-minute residual TIC.

The Commission concedes that the nature of the non-service related costs in the TIC is “unknown.”²⁹ Thus, the Commission cannot contend that these costs should be recovered through the LECs’ transport rates, given the current state of the record.³⁰ The Commission’s decision to eventually eliminate the non-service related portion of the remaining TIC by targeting X-factor reductions to the per-minute residual TIC and by shifting remaining TIC costs to PICCs demonstrates that these costs do not belong in the LECs’ transport rates. Ultimately, non-service related remaining TIC costs for all LECs will be recovered from the IXCs through PICCs regardless of whether the LEC or a CLEC provides transport services. It is only during the interim period before remaining TIC costs are fully transitioned to PICCs that the Commission’s rule will prevent the LECs from recovering a substantial portion of per-minute residual TIC revenues from traffic that is not routed to LEC transport services. The Commission provides no justification for disallowing recovery of these costs during the interim period.

²⁹ See *id.* at para. 231.

³⁰ See *id.* at para. 232; see also *id.* at para. 242.

2. The Residual TIC Rule Will Have Arbitrary And Discriminatory Impacts On The LECs.

The Commission's decision is also arbitrary in its effect. The LECs will recover varying amounts of revenues in the per-minute residual TIC. We estimate that, on January 1, 1998, some LECs will not have a per-minute residual TIC at all -- they will recover remaining TIC costs, including service related, from PICCs that will apply to all IXC's, including those that use CAP transport services.³¹ The Commission does not explain why some LECs should be allowed to recover their remaining TIC costs from CAP transport through PICCs, while others, similarly situated except for the initial level of the TIC, should be effectively prevented from recovering the same type of costs through per-minute residual TICs.

The Commission's residual TIC rule will have a disproportionate effect on NYNEX. NYNEX's estimated per-minute residual TIC on January 1, 1998 will be set to recover \$370 million, which is about half of the total LEC revenues from the per-minute residual TIC. We estimate that, while about 40% of industry remaining TIC revenues will be service-related, only about 11% of NYNEX's remaining TIC will be service-related as of January 1, 1998. Further, we expect that NYNEX will be the only LEC with a per-minute residual TIC rate after July 1, 1999. Thus, the Commission's rule will have a particularly harsh effect on

³¹ See attached Affidavit of Frank J. Gumper.

NYNEX, despite the fact that NYNEX has relatively little in the way of service related costs in the remaining TIC.

The Commission's rule also has arbitrary effects due to the way that the price cap rules operate. The price cap rules will require the per-minute residual TIC to be established as of January 1, 1998 based on a remapping of 1996 Local Transport demand.³² For this reason, the initial per-minute residual TIC on January 1, 1998 will not take into account the growth in Local Transport traffic carried by the CAPs in 1997. Moreover, since the IXC's now know that they will get a substantial discount by routing LEC Switched Access traffic to CAP transport, they are motivated to increase the number of local transport circuits that they will roll over to the CAPs in 1997 and 1998. Thus, the LECs will receive substantially less revenues from the per-minute residual TIC than is assumed in their price cap models.

This contradicts the Commission's decision that the access charge reform would not, in itself, produce overall rate reductions,³³ and that the LECs would be permitted to transition the remaining TIC revenues to PICCs. Because the 1998 per-minute residual TIC revenues will be less than those calculated in the restructure, the price cap rules will force the LECs to move significantly less revenues to PICCs in subsequent filings. The LECs will never receive the amount of revenues from per-minute residual TIC rates or PICCs that will be

³² See 47 C.F.R. Section 61.46(c).

³³ See *Access Charge Reform Order* at paras. 42-45.

included in their January 1, 1998 tariff revisions. Yet, at least with regard to the non-service related portion of the remaining TIC, the LECs will still incur those costs even if the IXC's shift their Local Transport traffic to the CAPs. Thus, the Commission's decision on the per-minute residual TIC will have the inequitable and unintended effect of disallowing costs that the LECs will continue to incur, and that the Commission never found they were not entitled to recover.

Even as to the service-related portion of the remaining TIC, the Commission's rule is not justified. The Commission has required the LECs to recover two thirds of the tandem switching costs in the remaining TIC as of January 1, 1998 through the per-minute residual TIC rate (insofar as the costs are not shifted to PICCs) from traffic on both tandem-switched and dedicated transport traffic. In addition, the unitary rate structure will continue to apply until July 1, 1998. This, in effect, continues to require the purchasers of dedicated transport to subsidize purchasers of tandem-switched transport. The Commission found that this temporary subsidy was a reasonable method of responding to the Court's directive in the *CompTel* case that the Commission revise its transport rate structure rules to be more consistent with cost-causation principles, because the Commission's decision would eventually transition all tandem switching costs out of the remaining TIC and into the Tandem Switching rate element.³⁴ However, in the next breath, the Commission prohibited the

³⁴ See *id.* at para. 232.

LECs from recovering this subsidy on traffic that is routed to the dedicated transport services of the CAPs. This prevents the LECs from recovering their full tandem switching costs.

The Commission's price cap rules prevent the LECs from increasing their Tandem Switching rates to offset the loss of this subsidy. Indeed, since the revenues from the per-minute residual TIC form the basis for the future price cap restructures that will shift cost recovery to the Tandem Switching rate element, a reduction in per-minute residual TIC revenues could cause a permanent reduction in the amount of revenues that will be recovered through tandem switched rates if the per-minute residual TIC revenues fall below the level of service-related costs in the remaining TIC.

The Commission adopted the per-minute residual TIC as a transition mechanism to achieve cost-based rates. The Courts have found interim measures to be acceptable if they are reasonable.³⁵ In this case, the mechanism is inherently flawed -- it will never reach its intended goal. The rule prohibiting the LECs from applying per-minute residual TIC to CAP transport is tantamount to a disallowance of substantial portions of the LECs' remaining TIC revenues, without any finding that the LECs will not continue to incur the associated costs.

³⁵ See, e.g., *CompTel* at 531.

3. The Rule Will Hinder, Rather Than Promote Competition.

Rather than promote competition, the Commission's rule will hinder the company that is facing the greatest competitive challenge. As noted, the rule will have a severely disproportionate effect on NYNEX, which has been in the forefront of promoting local exchange competition. NYNEX was the first LEC to offer physical collocation, and the NYNEX region was the first in which the CAPs began offering competitive transport services. In the *USPP Waiver Order*, the Commission recognized the advanced state of competition in the NYNEX region by granting NYNEX a waiver to deaverage its Switched Access rates in New York LATA 132.³⁶ NYNEX expects that the January 1, 1998 rate restructure will result in approximately \$90 million in per-minute residual TIC revenues in NYNEX end offices where the CAPs have, or will have, collocated facilities.³⁷ It is highly unlikely that NYNEX will be able to bill this amount, since the IXC's can avoid it simply by transferring their transport business to the CAPs. Consequently, NYNEX will be hardest hit by the Commission's rule, because it has the combination of the largest remaining TIC and the greatest amount of physically collocated competitive local transport. This will not promote the Commission's objective of full and fair competition in the Local Transport market.

³⁶ See *USPP Waiver Order* at paras. 38-46.

³⁷ See attached Affidavit of James Kane.

For all of the foregoing reasons, the Commission's per-minute residual TIC rule is arbitrary and capricious. The Commission should stay the rule in its entirety. At the very least, the Commission should stay the portion of the rule that prevents the LECs from applying the non-service related portion of the per-minute residual TIC on traffic that is not carried on LEC transport.³⁸ This portion was not intended to be recovered through LEC transport rates, so there is no reason not to apply it to LEC traffic that is routed to CAP transport.

B. The Per-Minute Residual TIC Rule Was Adopted Without Adequate Notice And Opportunity For Comment.

Under the Administrative Procedure Act, the Commission must provide notice and an opportunity for public comment on rules of general applicability.³⁹ It failed to do so with regard to its per-minute residual TIC rule. In the section of the *Access Charge Reform Order* that adopted this rule, the Commission cited paragraph 97 of the *NPRM* as having raised the subject of application of the TIC to CAP transport.⁴⁰ However, that paragraph did not put the LECs on notice that the Commission would adopt a rule that would retain a portion of the TIC, but prevent the LECs from applying the TIC to CAP transport. The Commission could be sure that NYNEX, which has the largest amount of TIC revenues in the

³⁸ NYNEX estimates that its tandem switch service-related residual TIC costs will be approximately \$41 million as of January 1, 1998. NYNEX is not able to quantify, at this time, the impact on the per-minute residual TIC as a result of the elimination of the unitary rate structure on July 1, 1998.

³⁹ 5 U.S.C. Section 553(b).

⁴⁰ See *Access Charge Reform Order* at para. 240.

industry, as well as a large number of central offices with physical collocation, would have reacted vigorously to such a proposal. This issue was first raised by CompTel and Teleport in an *ex parte* filing made after the comment period had ended and three weeks before the *Access Charge Reform Order* was adopted.⁴¹ *Ex parte* filings are not served on the parties, and there is no indication that the LECs had an adequate opportunity to respond. The Commission never asked the industry to submit the data that was needed to adequately assess the effects of the CompTel/Teleport proposal.

If the Commission had properly noticed this issue, the LECs would have had the opportunity to provide the information discussed above, which would have given the Commission a basis in the record for deciding this issue. There is nothing in the record to show that the Commission considered or quantified the impact of this rule on the LECs. Having heard only one side of the story, the Commission failed to reach a reasoned decision on the merits. For this reason alone, the Commission should stay its rule pending further opportunity for notice and comment.

IV. NYNEX Will Suffer Irreparable Harm Absent A Stay

NYNEX will suffer irreparable harm absent a stay. First, a simple rate comparison shows that the rule will have a devastating impact on NYNEX's revenues, making it impossible for NYNEX to recover the bulk of residual TIC

⁴¹ See *id.* at para. 179, n. 242.

revenues. Second, it will provide an irresistible and uneconomic incentive for customers to shift all of their traffic to CAP transport wherever it is available. NYNEX will not have a reasonable opportunity to compete for this traffic unless it reduces the per-minute residual TIC rates to zero, losing hundreds of millions of dollars.

We estimate that approximately \$90 million of NYNEX's per-minute residual TIC revenues will be generated in offices where the CAPs either have already collocated multiplexing nodes or have ordered new nodes to be built. While the minutes of use that were routed to the CAPs as of 1996 will be taken into account in setting the per-minute residual TIC rate, that rate will not take into account the additional minutes that will be routed to the CAPs as a result of the normal growth in CAP traffic plus the effects of the Commission's order. NYNEX can expect a substantial and continuing diversion of traffic to the CAPs simply because the elimination of the per-minute residual TIC on CAP transport provides an irresistible incentive for the IXC's to divert their traffic to the CAPs as quickly as possible, and far in advance of January 1, 1998.⁴² NYNEX can also expect that the CAPs will seek to establish additional collocation nodes in more

⁴² NYNEX has already had conversations with the IXC's that indicate their intention to take advantage of the exemption from per-minute residual TIC charges by shifting to CAP transport as quickly as possible. See attached Affidavit of James Kane. In addition, the petitions for reconsideration of the *Access Charge Reform Order* that were filed by AT&T and Teleport seeking to advance the date of the rule from January 1, 1998 to the present are testimonials to their appreciation of the windfall that this rule will produce.